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In the Supreme Court of the United States

COOKEVILLE REGIONAL MEDICAL CENTER, ET AL.,
Petitioners,

v.

MICHAEL O. LEAVITT, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

I. The Secretary's Response Does Nothing To Allay The Circuit Conflict On Whether And When A Statutory Amendment Can Be Characterized As A Clarification To Avoid The Presumption Against Retroactivity 2

II. The Secretary's Response Does Nothing To Allay The Circuit Conflict Over The Role Of Reliance In The Retroactivity Analysis 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7

INS v. St. Cyr, 533 U.S. 289 (2001) 4, 10

Landgraf v. USI Film Products, 511 U.S. 244 (1994) ..... *passim*

Levy v. Sterling Holding Co. LLC, 544 F.3d 493 (3d Cir. 2008) 5

Loving v. United States 517 U.S. 748 (1994) 8, 9

Paramount Health Systems, Inc. v. Wright, 138 F.3d 706 (7th Cir. 1998) 8, 9

Princess Cruises, Inc. v. United States, 397 F.3d 1358 (Fed. Cir. 2005) 4

Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 8-9

Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075 (Fed. Cir. 2003) 9

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 8, 9

REGULATIONS

65 Fed. Reg. 3136 (Jan. 20, 2000) 11

REPLY BRIEF FOR PETITIONERS

This case provides an ideal opportunity for this Court to resolve substantial disagreements in the circuits on the circumstances, if any, in which a court may bypass the rigorous analysis, *see Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that must be employed when concluding that the long-cherished presumption against retroactive application of new legislation is overcome. In reasoning that the Deficit Reduction Act of 2005 (DRA) could be applied retroactively, the D.C. Circuit's decision here directly implicates and heightens existing circuit conflicts concerning two pivotal issues: (1) whether the constitutionally grounded presumption against retroactivity can be bypassed based on a court's conclusion, without any express indications from Congress, that a statutory amendment is a clarification as opposed to a change in the law; and (2) whether proven reliance on prior law is a prerequisite for application of the presumption against retroactivity.

The Secretary's response does not cite, mention, or discuss these conflicts. On the clarification issue, the Secretary simply assumes the conflict's resolution, declaring that a court may bypass the rigorous *Landgraf* analysis whenever it concludes that an amendment amounts to a clarification of prior law. But that legal conclusion is, in fact, a marked departure from this Court's own retroactivity jurisprudence and it puts the D.C. Circuit's opinion squarely in the middle of the conflict. On the reliance issue, the Secretary impliedly concedes the conflict, but maintains that there is no concern because the decision below was

not based on Petitioners' reliance. A fair reading of the D.C. Circuit's opinion proves otherwise, however, and this conflict too remains.

The question before the D.C. Circuit was whether the DRA could be applied retroactively. The DRA does not contain express congressional authorization for retroactive application. Consequently, under *Landgraf*, the court should have stopped there, as the answer under *Landgraf* should have been: No, the DRA cannot be applied retroactively because Congress did not expressly authorize that result. The D.C. Circuit rejected that approach, joining other circuits that have departed from *Landgraf* and its progeny and concluded that "clarifications" are not subject to the presumption against retroactivity. The D.C. Circuit then went further still, drawing its clarification and retroactivity conclusions without any objective indication from *Congress* that it intended either result when enacting the DRA. This approach is contrary to *Landgraf* and conflicts with other circuits' approaches that determine whether an amendment is a clarification based on congressional declarations.

In the end, the Secretary's efforts to marginalize the multiple conflicts raised by the D.C. Circuit's resolution of this case are unavailing. And, no effort at marginalization can hide the profound effect of the D.C. Circuit's erroneous retroactivity analysis on the outcome of this case. The retroactivity issues raised are reoccurring and implicate constitutional principles "deeply rooted in [the Court's] jurisprudence." *Landgraf*, 511 U.S. at 265. Moreover, the erroneous retroactivity analysis paved the way for retroactive application of the DRA, which deprived Petitioners of over $54 million in

reimbursement for treating low income patients under the pre-DRA statutory scheme. This Court's intervention accordingly is warranted, needed, and urged.

I. The Secretary's Response Does Nothing To Allay The Circuit Conflict On Whether And When A Statutory Amendment Can Be Characterized As A Clarification To Avoid The Presumption Against Retroactivity

This Court's precedents, including *Landgraf*, emphasize that only Congress can say when new legislation should be applied retroactively. Yet, as explained in the Petition, several circuits have departed from these precedents, concluding that statutory "clarifications" do not pose retroactivity concerns and can be applied retroactively without an express statement from Congress authorizing that result.

The D.C. Circuit followed suit. In its view, the constitutionally-grounded presumption against retroactivity can be overcome without express congressional authorization and even without any objective indication that *Congress* regarded an amendment as merely a clarification of prior law.[1] This approach—which the Secretary claims is not

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[1] The D.C. Circuit reasoned that because "it was unclear prior to the Deficit Reduction Act, whether the Secretary had discretion to exclude the expansion waiver population from the disproportionate share hospital adjustment[,] ... [i]t follows that there is no problem of retroactivity. The Deficit Reduction Act did not retroactively alter settled law; it simply clarified an ambiguity in the existing legislation." App. 10a-11a.

controversial and provides no reason for concern—contravenes this Court's directives and threatens to undermine the due process underpinnings of the presumption against retroactivity. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective") (citing *Landgraf*, 511 U.S. at 264); *Landgraf*, 511 U.S. at 272-73 ("Requiring clear intent assures that *Congress itself* has affirmatively considered the potential unfairness of retroactive application ... and has the additional virtue of giving legislators a predictable background rule against which to legislate.") (emphasis added).

Indeed, as the Federal Circuit has explained, "the binary analysis—change or clarification"—which bypasses the *Landgraf* analysis—"conflicts with the court's obligation to weigh the various factors described in *Landgraf*[,] [as] *Landgraf* explicitly requires the court to consider 'the *nature and extent* of the change in the law,' not merely whether a change has occurred." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (emphasis in original) (quoting *Landgraf*, 511 U.S. at 270).

The D.C. Circuit's circumvention of *Landgraf's* more rigorous retroactivity analysis accordingly implicates two separate issues on which the circuits are in conflict.

The first is whether describing legislation as a clarification of prior law avoids altogether the constitutionally-driven *Landgraf* analysis. If the answer to the threshold question is "yes," the second issue is what is required to establish that legislation

is a clarification that may be applied retroactively without a *Landgraf* analysis. The circuits indisputably are divided on both questions. Pet. 13-23; *see also Levy v. Sterling Holding Co. LLC*, 544 F.3d 493, 506 (3d Cir. 2008) (recognizing divergent views on whether a clarification raises retroactivity concerns requiring evaluation under the *Landgraf* analysis) (citing cases including the D.C. Circuit's opinion below).

The Secretary initially responds that this Court need not worry about these various conflicts because "there is no conflict in the circuits on the specific ruling by the court of appeals" (*i.e.*, whether the DRA could be applied retroactively), Opp. 8, and because the "Medicare provisions at issue addressed a closed period that ended with the enactment of the DRA in February 2006." Opp. 7.

But these assertions just beg the question. It is the approach to the retroactivity analysis that gives rise to the conflicts, not the result reached in a particular case, and the D.C. Circuit's reasoning in this case squarely implicates those conflicts. And there is nothing the least bit transitory about the D.C. Circuit's retroactivity approach—retroactivity questions arise routinely and the D.C. Circuit's precedential opinion is now firmly in play in that ongoing controversy.

The Secretary next attempts to avoid review by arguing that "Congress clearly intended the DRA to have a retroactive effect." Opp. 9. This is pure *ipse dixit*. The Secretary never points to anything demonstrating the required *congressional* authorization of the DRA's retroactive application. The effective date of the ratification provision on

which the Secretary relies in fact supports the opposite result—it plainly prohibits any application of the DRA to pre-2000 periods and calls only for "prospective application."[2] App. 51a.

For his next salvo, the Secretary argues that the D.C. Circuit's finding that the DRA could be applied retroactively was correct because "[i]f prior law was ambiguous as to the legal consequences of past events, [then] clarification ... does not work a change in the law." Opp. 8. Again, the Secretary's sweeping conclusion just begs the question of whether the D.C. Circuit's reasoning comports with controlling retroactivity principles. More particularly, the issues here are whether the court's "clarification" conclusion provides a justification for bypassing *Landgraf* and, if it does, what support is needed for a court to draw such a conclusion about a statutory change. Notwithstanding the result in this case, these issues, too, implicate an existing conflict and are part of an ongoing controversy.

Thus, the Third, Fourth, Eighth, Ninth, and Eleventh Circuits would have focused on whether the text of the DRA or its legislative history provided

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[2] The Secretary also asserts that the DRA was enacted "[i]n response to *Portland Adventist* and related litigation." Opp. 4. This statement simply is untrue. There is nothing in the DRA or conference committee materials indicating that Congress was aware of any dispute regarding expansion waiver days, let alone that the DRA was a "response" to the Ninth Circuit's decision in *Portland Adventist* or the D.C. District Court's decision in *Cookeville I*—both of which held that the statute required inclusion of expansion waiver days in the DSH calculation. *See* App. 51a-52a.

some objective indication that Congress in fact intended §5002 of the DRA to be a clarification of existing law. In contrast, the D.C. Circuit made no effort to examine the statute or legislative history in search of congressional intent to clarify. It reached its own conclusion that a clarification was intended. But that approach only highlights the vagaries engendered by the conflict. A court's own view on statutory ambiguity says nothing about whether an amendment is a clarification of prior law as opposed to an effort to change the law. Congress might amend an ambiguous statute because it wants to clarify it, but it also could take that step because it wants to change the law.[3]

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[3] The decision below illustrates the mischief that can follow when congressional intent ceases to be the arbiter of the retroactivity analysis. Contrary to the Secretary's assertions, the D.C. Circuit interpretation of the pre-DRA statute (*i.e.*, that it was ambiguous) was not based on a conventional exercise in statutory construction. The D.C. Circuit did not ask, as required, whether the language of the pre-DRA statute itself required expansion waiver days to be included the Medicare DSH adjustment. Instead, the D.C. Circuit concluded that the pre-DRA statute was "unclear" by relying on its own view of the import the DRA. App. 10a-11a (evaluating whether the pre-DRA statute was "unclear" by asking which reading of that statute "finds some support in the [DRA]"). This resort to extrinsic materials to determine the meaning of the pre-DRA statute violates settled principles of statutory construction. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress ....").

The Secretary next attempts to shore up the D.C. Circuit's retroactivity analysis by arguing that "when Congress passes '[s]ubsequent legislation declaring the intent of an earlier statute,' the new enactment should be accorded 'great weight in statutory construction of the earlier enactment.'" Opp. 7-8 (quoting *Loving v. United States* 517 U.S. 748, 770 (1994)). But there is, as noted, no such congressional declaration here and the Secretary's resort to the *Loving* excerpt in these circumstances brings the need for this Court's intervention into even sharper focus.

While the Secretary is content to let the courts speculate on the import of new legislation—with the retroactivity analysis hanging in the balance—no firm or consistent line of authority is likely to arise from such an approach. As Judge Posner has observed, "Congress is not an interpretive body and has no felt duty to maintain continuity with the past. 'The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706, 710-11 (7th Cir. 1998) (quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963));[4] *see also Seatrain Shipbuilding Corp.*

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[4] In the case before him, Judge Posner explained that "[t]here is an air of unreality in treating section 4714(a) [the new legislative enactment] as an attempted clarification of original statutory meaning, although it is captioned 'Clarification Regarding State Liability for Medicare Cost-Sharing.' The disputed quimby provisions date from 1986 ... —eleven years before the Balanced Budget Act was passed. The membership of Congress had largely turned over during the interim and surely few members of the 105th Congress who had been

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v. Shell Oil Co., 444 U.S. 572, 596 (1980) ("[T]he views of subsequent Congresses cannot override the unmistakable intent of the enacting one....").

As Judge Posner further observed, *Loving's* "instruct[ion] ... is "not easy to reconcile with" this Court's other instruction that caution should be exercised in using the views of a subsequent Congress to infer the intent of an earlier one. *Paramount Health*, 138 F.3d at 710 (quoting *Loving*, 517 U.S. at 770 and citing *Philadelphia National Bank*, 374 U.S. 321). Consequently, as Judge Posner concluded, "we're in a quandary concerning the continued vitality of the *Loving* line, and would welcome clarification from the Supreme Court ..." *Paramount Health*, 138 F.3d at 711; *see also Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1092 (Fed. Cir. 2003) ("There appears to be some confusion as to the role of later statutes in interpreting earlier ones.").

Landgraf and it progeny establish definitive and workable standards for determining whether new legislation can be applied retroactively. These standards avoid judicial speculation about what Congress intended and embody "the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place[,] ... a rule of law that gives

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members of Congress back in 1986 remembered what the membership's intentions had been regarding the esoteric issue of the reimbursement rate for providers of medical services to quimbies." *Paramount Health*, 138 F.3d at 709-10.

people confidence about the legal consequences of their actions." *St. Cyr*, 533 U.S. at 316. *Landgraf's* standards also provide "legislators with a predictable background rule against which to legislate." *Landgraf*, 511 U.S. at 273. In contrast, the clarification end run around *Landgraf*, most starkly reflected in the D.C. Circuit's opinion below, resorts to speculation about Congress's intent, undermines *Landgraf's* paramount purposes, and invites disparate and irreconcilable results. The Court should grant the petition and restore the predictability and certainty that *Landgraf* sought to engender.

II. The Secretary's Response Does Nothing To Allay The Circuit Conflict Over The Role Of Reliance In The Retroactivity Analysis

The Petition also presents the question of whether reliance on prior law is a prerequisite for application of the presumption against retroactivity. The circuits are deeply divided on this question and several circuit opinions have noted the controversy and the need for a resolution. Pet. 26-29. The circuits also are closely divided on what type of reliance (objectively reasonable reliance or individualized subjective reliance) must be established in undertaking the retroactivity analysis and this conflict too has been expressly acknowledged in circuit decisions. Pet. 29-30.

The Secretary essentially concedes that this conflict exists. To avoid review, he simply asserts that the D.C. Circuit did not address the issue of whether reliance on prior law is a prerequisite triggering *Landgraf's* presumption against

retroactivity. Opp. 8-9.[5] The D.C. Circuit's opinion does not, however, lend itself to this characterization.

The D.C. Circuit began its analysis by asking whether Petitioners had relied on the language of the pre-DRA statutes when they provided care to expansion waiver populations. App. 7a-8a. And its conclusion that Petitioners could not have relied on the pre-DRA statute was a core component of its decision. The court first noted that Petitioners had argued that the pre-DRA statute "cannot be applied retroactively consistent with *Landgraf* ... because Congress did not clearly indicate its intention to this effect." App. 7a. In rejecting Petitioner's argument, the D.C. Circuit stated that (1) there are a "host of exceptions that weaken the antiretroactivity principle, (2) "the presumption against retroactivity exists to protect settled expectations," and (3) then concluded, "[h]ere the Hospitals could not have been certain of being reimbursed." App. 7a-8a. In short, the D.C. Circuit held that the DRA could be applied retroactively because the Hospitals could not reasonably have relied on the pre-DRA Medicare statute.

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[5] The Secretary, however, persists in arguing that Petitioners could not have relied on the pre-DRA statute, claiming that he had uniformly taken the position that "expansion populations ... indisputably are not Medicaid eligible." Opp. 7. Again, the Secretary misstates the facts. As early as January 20, 2000, the Secretary officially proclaimed in the Federal Register that expansion populations "were made eligible [for Medicaid] under the waiver." 65 Fed. Reg. 3136 (Jan. 20, 2000).

By concluding that reliance is a prerequisite for invocation of the presumption against retroactivity, the D.C. Circuit and several others have fundamentally altered the retroactivity analysis. Elevation of reliance to a requirement results in a sea change in retroactivity jurisprudence and significantly limits the circumstances in which the deeply-rooted presumption against retroactivity can be invoked.

Once again, the differences in the circuits' approaches are consequential, as they can and will lead to different results on the retroactivity question even when the same statute is involved. This Court's intervention is needed to restore certainty and predictability and avoid these divergent outcomes.

CONCLUSION

The existing law on the proper approach to the retroactivity analysis is rife with conflicts and those conflicts are squarely presented in this case. For the reasons Petitioners have highlighted, the Petition should be granted.

Respectfully submitted,

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